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International Convention for the Protection of All Persons from Enforced Disappearance

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Committee on Enforced Disappearances

Concluding observations on the report submitted by the Netherlands under article 29, paragraph 1, of the Convention*

1. The Committee on Enforced Disappearances considered the report submitted by the Netherlands under article 29, paragraph 1, of the Convention (CED/C/NLD/1) at its 82nd and 83rd meetings (CED/C/SR.82 and 83), held on 18 and 19 March 2014. At its 94th meeting, held on 26 March 2014, it adopted the following concluding observations.

A. Introduction

2. The Committee welcomes the report submitted by the Netherlands, under article 29, paragraph 1, of the Convention. In addition, the Committee appreciates the constructive dialogue with the delegation from the State party on the measures taken to implement the provisions of the Convention, which has dispelled many of its concerns. The Committee also thanks the State party for its written replies (CED/C/NLD/Q/1/Add.1) to the list of issues (CED/C/NLD/Q/1), as supplemented by statements by the delegation.

B. Positive aspects

3. The Committee commends the State party for having ratified almost all of the United Nations core human rights instruments and their optional protocols, as well as the Rome Statute of the International Criminal Court.

4. The Committee also welcomes the fact that the State party has recognized the competence of the Committee, under articles 31 and 32 of the Convention, in respect of individual and inter-State communications.

5. The Committee also commends the State party on the measures adopted in areas related to the Convention, such as the initiative to include enforced disappearance as an autonomous crime in the International Crimes Act of 19 June 2003, in addition to it being defined as a crime against humanity. The act, inter alia, establishes the imprescriptibility of the offence and foresees superior responsibility and extraterritorial jurisdiction.

* Adopted by the Committee at its sixth session (17–28 March 2014).

6. The Committee notes with satisfaction that the State party has extended an open invitation to all special procedures mandate holders of the Human Rights Council to visit the Netherlands.

C. Principal subjects of concern and recommendations

7. The Committee considers that, at the time of writing, the legislation in force in the State party to prevent and punish enforced disappearance, and other related measures, were not in full compliance with the obligations incumbent on States that have ratified the Convention. The Committee recommends that the State party take account of its recommendations, which have been made in a constructive and helpful spirit, with the aim of strengthening existing legislation and guaranteeing that the legislation, and the way it is implemented by the State authorities, is fully consistent with the rights and obligations contained in the Convention.

General information

8. The Committee welcomes the statement made by the delegation indicating that it is envisaged that the ratification of the Convention will be extended to the other, autonomous parts of the Kingdom of the Netherlands, namely Aruba, Curaçao and St Maarten, within two or three years.

9. **The Committee invites the State party to accelerate the process for the extension of the ratification of the Convention and the acceptance of the competence of the Committee under articles 31 and 32 by the autonomous islands of Aruba, Curaçao and St Maarten.**

10. As regards the application of the Convention in the Caribbean part of the Netherlands, namely in Bonaire, St Eustatius and Saba, the Committee takes into account the assurances of the delegation that the same general principles apply as in the European part of the Netherlands. However, it observes that, according to replies to the list of issues (CED/C/NLD/Q/1/Add.1, paragraph 62), the Criminal Injuries Compensation Fund applies only "in cases of violent crimes committed on the territory of the Netherlands (not including Bonaire, St Eustatius and Saba)".

11. **The Committee calls on the State party to take all the requisite measures to harmonize its procedures and practices throughout its territory in order to ensure the uniform application of the Convention in the European and Caribbean parts of the Netherlands.**

12. The Committee notes the explanation provided by the State that the direct applicability of the provisions of the Convention is ultimately determined by the domestic courts. Since there have been no cases of enforced disappearance and the Convention has never been invoked before the courts, in particular before the Supreme Court, the Committee is concerned at the uncertainty this may create as to whether certain provisions of the Convention are directly applicable, which may consequently hinder the fulfilment of the obligations and the enjoyment of the rights emanating from the Convention.

13. **The Committee calls upon the State party to take all the necessary measures to ensure the direct applicability and uniform application of the provisions of the Convention.**

Definition and criminalization of enforced disappearance (arts. 1–7)

14. While commending the State for having included enforced disappearance as an autonomous crime in the International Crimes Act, the Committee is concerned that, insofar

as the definition of enforced disappearance in section 4 (2)(d) applies also to the autonomous crime, the definition does not include the "concealment of the fate or whereabouts of the disappeared person" as a possible element and does not mention that the crime should be committed by "agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State" but by or with the authorization, support or acquiescence of a "State or political organization". The Committee takes note of the position of the delegation that removal from the protection of the law is regarded as a consequence of the crime of enforced disappearance and not as a constitutive element of that crime (art. 2).

15. **The Committee recommends that the State party review the definition of enforced disappearance in the International Crimes Act in order to ensure that, insofar as it applies to the autonomous crime of enforced disappearance, it is fully compliant with article 2 of the Convention.**

16. The Committee notes that section 8 (a) of the International Crimes Act permits the imposition of fines not exceeding 81,000 euros as a stand-alone penalty for the crime of enforced disappearance, without further specification of the minimum amount of the penalty. This gives the courts a broad margin of discretion when deciding between a prison sentence or a fine for this type of crime and when deciding on the quantum of the penalty, particularly with regard to the amount of the penalty in cases where the minimum sentence is applied (art. 7).

17. **The Committee recommends that the State party revise its legislation, with a view to removing the possibility of imposing fines as a stand-alone penalty for the offence of enforced disappearance. The State party should also ensure that the imposition of the minimum penalty for the crime of enforced disappearance takes due account of the extreme seriousness of the offence, in accordance with article 7 of the Convention.**

Criminal responsibility and judicial cooperation in relation to enforced disappearance (arts. 8–15)

18. The Committee notes with satisfaction that, in the majority of cases, the investigation of cases of enforced disappearance is carried out by specialized bodies, namely the National Public Prosecutor's Office in Rotterdam and the International Crimes Team of the National Police Services Unit. The Committee has also taken note of the assertion by the delegation to the effect that the discretionary principle is severely limited for prosecutors by the obligation to investigate enforced disappearances. However, the Committee notes that the competence to investigate offences of enforced disappearance committed in a military context fall under the Royal Netherlands Marechaussee, a military police force. The Committee is concerned that the suspension from duties of officials suspected of having committed an enforced disappearance is not always guaranteed in criminal investigations. (arts. 11 and 12).

19. **The Committee encourages the State party to ensure that persons suspected of having committed an offence of enforced disappearance are not in a position to influence investigations by directly or indirectly obstructing them. For this reason, it recommends that the State party adopt an explicit legal provision providing for the suspension from duties of officials suspected of having committed an enforced disappearance. The Committee further recommends that the State party take the necessary measures to ensure that all cases of enforced disappearances are only investigated and tried by the competent civil authorities.**

20. The Committee welcomes the protection afforded to witnesses and relatives in the State party and the statement made by the delegation that this protection could be extended, in principle, to other persons that may be affected by the investigation (art. 12).

21. **The Committee recommends that the State party adopt the necessary steps to ensure that the existing protection measures are effectively applied with regard to all persons referred to in article 12, paragraph 1, of the Convention.**

Measures to prevent enforced disappearance (arts. 16–23)

22. The Committee notes with satisfaction that the asylum and extradition procedures provide for a suspensive appeal of the decision to return or extradite. However, the Committee is concerned at information indicating that the appeals procedure for rejected asylum applications does not always provide for a substantive review of the facts, even if future changes have been announced by the delegation in this regard (art. 16).

23. **The Committee calls on the State party to ensure that the appeals procedure against a decision to extradite, return or expel provides for a substantive review of the application when assessing whether there are grounds for believing that the applicant would be in danger of being subjected to enforced disappearance.**

24. The Committee takes note of the enactment in 2011 of the Netherlands Institute for Human Rights Act and of the designation of the different bodies composing the national preventive mechanism under the Optional Protocol to the Convention against Torture and Other Inhuman or Degrading Treatment or Punishment. However, the Committee is concerned that, according to section 7 paragraph 2, of the act, the access of the Institute to places that are designated as forbidden pursuant to the Protection of State Secrets Act may be restricted. Moreover, the Committee echoes the concern of the Committee against Torture that, since the inspectorates which make up the national preventive mechanism are divisions of various ministries, their independence could be compromised (art. 17).

25. **The Committee recommends that the State party remove the restriction set out in section 7, paragraph 2, of the Netherlands Institute for Human Rights Act in order to ensure unrestricted access of the Institute to all places of detention. The Committee also recommends that the State party ensure that the national preventive mechanism enjoys complete financial and operational independence from the executive, as recommended by the Committee against Torture. The Committee encourages the State party to ensure that those bodies are also able to discharge their functions in the Caribbean part of the Netherlands effectively.**

26. The Committee notes that the State party has not been able to clarify whether methods of inspection exist to ensure that the data stored in the different registers of persons deprived of liberty are fully compliant with article 17, paragraph 3, of the Convention (art. 17).

27. **The Committee recommends that the State party keep up its efforts to ensure that all registers of persons deprived of their liberty are properly completed and regularly updated, with at least the information required under article 17, paragraph 3, of the Convention. In addition, the Committee recommends that the State party establish effective methods of inspection to verify regularly that records are properly completed and updated.**

28. While recognizing the legal significance of respect for the privacy of persons deprived of their liberty, the Committee regrets the statement by the State party that the information listed in article 18 of the Convention will not automatically be supplied to the relatives of a person deprived of liberty. Given that the "refusal to acknowledge the deprivation of liberty or ... concealment of the fate" of the disappeared person are

components of enforced disappearance, the right of any person with a legitimate interest to collect and receive information on the fate of a person presumed disappeared must be recognized (art. 18, 19 and 20).

29. **The Committee recommends that the State party adopt the requisite measures to ensure that any person with a legitimate interest has the right to gain access to at least the information contained in article 18, paragraph 1, of the Convention and a real possibility of being able to do so. The Committee calls on the State party to guarantee that those persons have access to prompt and effective judicial remedies to obtain that information without delay, as established in article 20, paragraph 2, of the Convention, and the possibility of appealing against a refusal to disclose this information.**

30. The Committee notes with concern that no specific and regular training on the Convention is provided to security and law enforcement personnel and other persons involved in the custody or treatment of persons deprived of liberty (art. 23).

31. **The Committee recommends that the State party ensure that all law enforcement personnel, whether civil or military, medical personnel, public officials, including migration officials, and other persons who may be involved in the custody or treatment of any person deprived of liberty, including judges, prosecutors and other court officials of all ranks, receive appropriate and regular training on the provisions of the Convention, in conformity with article 23 of the Convention.**

Measures to provide reparation and to protect children against enforced disappearance (arts. 24 and 25)

32. While recognizing that victims have certain procedural rights during an investigation under domestic criminal law, the right of victims to know the truth regarding the fate of the disappeared person is not explicitly granted. The Committee also notes with concern that the compensation provided by the Criminal Injuries Compensation Fund in cases of violent crimes only applies if the crime was committed in the European part of the Netherlands and would be due to the relatives only if the victim was deceased. In all other cases, the responsibility to pay compensation would fall on the person having committed the offence. The other forms of reparation specified under article 24, paragraph 5, of the Convention are not guaranteed (art. 24).

33. **The Committee recommends that the State party include an explicit provision for the right of victims to know the truth regarding the circumstances of an enforced disappearance and the fate of the disappeared person. The Committee calls on the State party to adopt the necessary legislative or other measures to recognize explicitly the right of persons who have suffered harm as the direct result of an enforced disappearance, which occurred in any part of the territory, to obtain prompt, fair and adequate compensation and all the other forms of reparation, without the need to prove the death of the disappeared person, in accordance with article 24, paragraphs 4 and 5, of the Convention.**

34. The Committee notes that the Civil Code of the State party sets out periods of time for establishing the legal presumption of death. While understanding the importance of clarifying the legal situation of the relatives of a disappeared person and their social entitlements, the Committee considers that this legal procedure, as a matter of principle, should not presume the death of the disappeared person until his/her fate has been clarified, given the continuous nature of enforced disappearance (art. 24).

35. **The Committee invites the State party to consider reviewing its legislation, with a view to incorporating a declaration of absence as a result of enforced disappearance, in order to adequately address the legal situation of disappeared persons and that of**

their relatives in areas such as social welfare, financial matters, family law and property rights.

36. While taking note of the current provisions of the criminal law concerning the removal of minors, the Committee considers that none of those provisions specifically reflect the situations set out in article 25, paragraph 1, of the Convention. The Committee also observes with deep concern that, despite the recommendation issued in 2009 by the Committee on the Rights of the Child on the need to prevent disappearances of unaccompanied children from asylum reception centres, additional reports indicate that in 2011 a large number of children left publicly-run reception centres without a trace (arts. 12 and 25).

37. **The Committee recommends that the State party incorporate into its criminal legislation the specific offences described in article 25, paragraph 1, of the Convention. The Committee also urges the State party to investigate thoroughly the disappearance of unaccompanied children from asylum reception centres and to search for and identify those children who may have been the victims of enforced disappearance, in conformity with article 25, paragraph 2, of the Convention.**

38. The Committee notes with interest the information provided by the State party on the possibility of revoking an adoption at the request of the adopted person. However, the Committee is concerned at information regarding cases of illegal adoption and the absence of specific procedures for the review and, where appropriate, annulment of adoptions or placements that originated in an enforced disappearance (art. 25).

39. **The Committee encourages the State party to consider establishing specific procedures for the review and, where appropriate, annulment of adoptions or placements that originated in an enforced disappearance, while keeping the principle of the best interests of the child as a primary consideration.**

D. Dissemination and follow-up

40. The Committee wishes to recall the obligations undertaken by States when ratifying the Convention and, in this connection, urges the State party to ensure that all the measures it adopts, irrespective of their nature or the authority from which they emanate, are in full accordance with the obligations it assumed when ratifying the Convention and other relevant international instruments. In this regard, the Committee particularly urges the State party to adopt the necessary measures to ensure that the Convention, in particular the safeguards it provides, is applied in full in both the European and the Caribbean parts of the Netherlands.

41. The Committee also wishes to emphasize the particularly cruel effect of enforced disappearances on the human rights of women and children. Women who are subjected to enforced disappearance are particularly vulnerable to sexual and other forms of gender violence. Women who are relatives of a disappeared person are particularly likely to suffer serious social and economic disadvantages and to be subjected to violence, persecution and reprisals as a result of their efforts to locate their loved ones. Children who are victims of enforced disappearance, either because they themselves were subjected to disappearance or because they suffer the consequences of the disappearance of their relatives, are especially vulnerable to numerous human rights violations, including identity substitution. In this context, the Committee places special emphasis on the need for the State party to ensure that gender perspectives and child-sensitive approaches are used in implementing the rights and obligations set out in the Convention.

42. The State party is encouraged to disseminate widely the Convention, its report submitted under article 29, paragraph 1, of the Convention, the written replies to the list of

issues drawn up by the Committee and the present concluding observations, in order to raise awareness among the judicial, legislative and administrative authorities, civil society and non-governmental organizations operating in the State party and the general public. The Committee also encourages the State party to promote the participation of civil society in the actions taken in line with the present concluding observations.

43. Noting that the State party submitted its core document in 1996 (HRI/CORE/1/Add.66), the Committee invites the State party to update it in accordance with the requirements for the common core document contained in the harmonized guidelines on reporting under the international human rights treaties (HRI/GEN.2/Rev.6, chap. I).

44. In accordance with the Committee's rules of procedure, by 28 March 2015 at the latest, the State party should provide relevant information on its implementation of the Committee's recommendations as contained in paragraphs 25, 33 and 35.

45. Under article 29, paragraph 4, of the Convention, the Committee requests the State party to submit, no later than 28 March 2020, specific and updated information on the implementation of all its recommendations and any other new information on the fulfilment of the obligations contained in the Convention, in a document prepared in accordance with paragraph 39 of the guidelines on the form and content of reports under article 29 to be submitted by States parties to the Convention (CED/C/2). The Committee encourages the State party to promote and facilitate the participation of civil society in the preparation of this information.